

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE: STRYKER REJUVENATE) Case No. 13-MD-2441 (DWF/FLN)
AND ABG II HIP IMPLANT)
PRODUCTS LIABILITY LITIGATION)
_____)
This Document Relates to) St. Paul, Minnesota
All Actions) October 5, 2015
) 2:28 p.m.

BEFORE **THE HONORABLE DONOVAN W. FRANK**
UNITED STATES DISTRICT COURT JUDGE
AND **MAGISTRATE JUDGE FRANKLIN L. NOEL**
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

STATUS CONFERENCE PROCEEDINGS

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P R O C E E D I N G S**I N O P E N C O U R T**

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3 THE HONORABLE JUDGE FRANK: You may all be seated,
4 thank you. And for all of those of you not just in the
5 courtroom but listening on the phone, my apologies for the
6 late start. I again have failed at being
7 uncharacteristically brief in our conference in Chambers.
8 So, obviously, the lawyers were all there promptly, but the
9 delay rests on my shoulders, not on theirs.

10 Before we begin, why don't we have first
11 introductions of Plaintiffs' counsel and whoever else you
12 would like to introduce. And I will go over to Defense
13 counsel so everybody knows who precisely is here.

14 MS. ZIMMERMAN: Thank you, Your Honor, Genevieve
15 Zimmerman for the Plaintiffs.

16 MR. GORDON: Ben Gordon for Plaintiffs.

17 MR. FLOWERS: Pete Flowers for the Plaintiffs.

18 MS. FLEISHMAN: Wendy Fleishman for the
19 Plaintiffs.

20 MR. DeGARIS: Annesley DeGaris for the Plaintiffs.

21 MR. NEMO: Tony Nemo for the Plaintiffs.

22 MS. ZIMMERMAN: Charles Zimmerman for the
23 Plaintiffs.

24 MR. BERNHEIM: Jesse Bernheim for the Plaintiffs.

25 THE HONORABLE JUDGE FRANK: If we move to Defense

1 counsel?

2 MR. GRIFFIN: Tim Griffin for the Defendants, Your
3 Honors.

4 MS. CATULLO: Kim Catullo for the Defendants.

5 THE HONORABLE JUDGE FRANK: And I will just
6 indicate for the record that we had an opportunity as we do
7 at these conferences to meet in Chambers.

8 And with that, unless you have anything at this
9 time, Judge Noel, we will proceed with the Joint Report and
10 Agenda for today's date. And we can begin with the agenda
11 item number one, the settlement update. And I see both
12 counsel are approaching the podium. And I guess there has
13 been some complaints filed that we didn't schedule this so a
14 group of you could go to the State Fair this year.

15 MR. FLOWERS: Ms. Catullo was complaining about
16 that, Your Honor.

17 THE HONORABLE JUDGE FRANK: Well, she was not the
18 only one. A group of hands just went up over there and
19 there were some others at the table. So, I guess we will
20 have to keep that in mind for future references.

21 MR. FLOWERS: So Your Honors, this is Pete Flowers
22 on behalf of the plaintiffs. I will just briefly make a
23 couple of statements and then pass it over. I think from
24 the settlement perspective, things have gone well.

25 Obviously, the super majority of eligible people

1 are in the settlement. The super majority of people that
2 are in the settlement have been paid. There continues to be
3 some lien follow-up work, as with every litigation. But,
4 all in all, we have been able to obtain things on a timely
5 basis.

6 MS. CATULLO: Your Honor, this is Kim Catullo. I
7 would just confirm as Mr. Flowers said, everything has gone
8 quite smoothly. And I would say over 95 percent of the 95
9 percent have actually been funded by Stryker.

10 Also, last Wednesday we had the Enhancement
11 Program officially close. In fact, some of those payments
12 have even started, or those award reports have started, as
13 well. So, things are really moving very smoothly from the
14 settlement standpoint.

15 THE HONORABLE MAGISTRATE JUDGE NOEL: One question
16 I forgot to raise when we were in Chambers is -- I can't
17 remember what it is called, the CMS -- CSM, the Medicare --
18 Corporation for Medicare Services. Is that going smoothly,
19 as well?

20 MR. FLOWERS: Yes. The Medicare end of it is
21 going very smoothly, Your Honor. There was an agreement
22 struck with Medicare where payments were being made for each
23 revision. And then there are payments that are associated
24 with re-revisions, et cetera. That is very smooth.

25 THE HONORABLE MAGISTRATE JUDGE NOEL: Okay.

1 MS. CATULLO: Your Honor, one other point on the
2 settlement as just related is that dismissals have begun, as
3 Your Honor probably knows there have been hundreds of
4 dismissals already in the MDL. The process is ongoing in
5 New Jersey and it is also starting up in some of the other
6 venues like Florida and Michigan and others. So, that has
7 been going very smoothly, as well.

8 Under the settlement agreement, as soon as the
9 payments are funded, we can start dismissing those cases, so
10 that is going on, as well.

11 THE HONORABLE JUDGE FRANK: One thing that isn't
12 necessarily directly related to the settlement update, but
13 since we touched on it in Chambers, I know as we sit here
14 today, we have -- "we" meaning the MDL here have in the
15 nature of 70 plus or minus a few cases of opt-outs.

16 Do we have an estimate for New Jersey, Florida or
17 any of the other states? I can't hold you to it, but just
18 an approximate number?

19 MS. CATULLO: Yeah, it is somewhat of a moving
20 number, but it is currently in the fifties in New Jersey,
21 and somewhere in the high forties to low fifties in Florida
22 in terms of what -- when we say opt-outs, we mean those
23 folks who were eligible for the program, counted in the
24 registration, and who did not come into the program.

25 It does not count the people who may have filed

1 subsequently, or who had a revision that doesn't qualify
2 because it is after a certain cutoff.

3 THE HONORABLE JUDGE FRANK: And if we could move
4 on to the discovery status?

5 MR. FLOWERS: Yes, Your Honors. As you know, the
6 discovery stay was over as of September 1st, and we are in
7 the process of conducting discovery. Just as an overview,
8 the MDL has provided Stryker with updated or new
9 interrogatories and requests to produce, attempting to
10 streamline what we are seeking.

11 We also have agreed to deposition dates on four
12 deponents, a fifth coming shortly. Those will take place
13 sometime in November. We have done third-party discovery
14 that we are awaiting for some documents on from them, as
15 well.

16 We have provided additional custodians that we are
17 seeking all of their custodial files, which they have agreed
18 to, to work for and provide, as well as an update on some
19 additional documents on the original 26 custodians that were
20 produced some time ago.

21 So, over the next several months, there is going
22 to be a significant amount of discovery conducted in this
23 case. There are opt-outs. There are cases that are people
24 that weren't qualified that are in your Court that we are
25 intending to push forward with.

1 MS. CATULLO: Your Honor, that is true. We have
2 come up with a plan, working together and cooperatively on
3 that. We, as you know, do believe that there should be
4 coordination nationally on this. There have been some
5 places where that has worked.

6 I think, particularly, we are hopeful that the
7 depositions, it will work out in that way. At least we seem
8 to be going that way at this point. But, as we talked about
9 before, we do believe written discovery should also be the
10 subject of coordination.

11 I think there are efforts that are being made on
12 that, but we just haven't been successful at this point.
13 So, that is just one of the other sticking points out there.

14 THE HONORABLE JUDGE FRANK: Well, and I can
15 indicate this, and I touched on this to some extent in
16 Chambers, not unlike other MDLs, at least, that I have had,
17 and I will be doing it again this week.

18 In the last month I have talked to Judge Henning,
19 Judge Hafele -- Judge Henning from the Broward County
20 Courthouse in Lauderdale. Judge Donald -- is it Hafele -- I
21 always mispronounce it for my court reporter, H-a-f-e-l-e,
22 from West Palm Beach. I have talked to Judge Janet Boes
23 from Saginaw, Michigan. And I have talked to Judge Rita
24 Miller from Los Angeles, and she just has one case.

25 And not unlike other MDLs, the reason I called

1 when I did and I said I would be reaching out after this
2 conference again is, as you already mentioned, the stay for
3 discovery that had concluded at the end of September when I
4 called, and this isn't -- it is the first time I have talked
5 to Judge Boes and Judge Miller. It is not the first time I
6 talked to Judge Henning and Judge Hafele. Of course, the
7 message was the same to each: Let's try to coordinate
8 discovery because, one, as we all know, that is the single
9 biggest criticism of these national cases is that there is
10 so much more money spent and delay by each individual party.
11 And it is supposed to save everybody time and money. And I
12 guess the phrase is economies of scale.

13 And then I also indicated that we meant what we
14 said here, that it isn't our way or the highway. And then
15 we meant what we said in the Order for the Stay of Discovery
16 saying. Let's try to coordinate it. That is what people
17 have a right to expect, for a couple of reasons.

18 We also put in the Order, for those cases that
19 truly look like either they need discovery to see if they
20 should settle it if they are legitimate outliers, or they
21 have decided to move on to trial, then as that Order said
22 when we stay discovery, we will expedite the discovery and
23 we will give calendar priority to discovery and trial date
24 issues.

25 And as I said in Chambers -- and that is exactly

1 what I said in prior MDLs, so we can coordinate this with
2 one another. I said, so let's do our best to do that,
3 working with each other on these cases and keep the
4 communication lines open, just not for the Judges, but the
5 lawyers across the country.

6 And so I reached out, and I will do that again.
7 And I am hopeful that we can just have a real coordinated
8 effort here to save time and money for everyone, as well as
9 coordinate times and dates. So, I don't know if Judge Noel
10 you have anything else on that issue?

11 THE HONORABLE MAGISTRATE JUDGE NOEL: Nothing
12 else, no.

13 THE HONORABLE JUDGE FRANK: So absent comments by
14 counsel or inquiry of the Court, we can move on to the
15 registration process, if you wish.

16 MS. CATULLO: Your Honor, I will speak to that.
17 As you know, we did have a registration process early on.
18 It was one of the first things we did as part of the
19 settlement program, really to just know what we call the
20 universe that was out there.

21 Now that we have gone through this program, that
22 registration process officially closed in December of 2014.
23 We have had, from time to time, requests for people to
24 update or to be registered. We were able to do that when
25 the base program was open. Once that closed, we really have

1 not been able to let anyone in because it would sort of mess
2 up the data.

3 Now I think everyone is in agreement that we need
4 to just update the registration. It will really assist the
5 Court in terms of knowing what the case system -- what is
6 actually out there on the docket, and also the parties to
7 know what is out there.

8 So, we are proposing that we will probably have an
9 order that is very similar to what the Court entered back in
10 November. That will just provide the updates for people who
11 registered, but their status has somehow changed. So, if
12 someone, for example, registered as an unrevised, and since
13 has had a revision, they will have an opportunity to update
14 their status to a revised patient.

15 And then also for people who want to register who
16 just didn't make it before the cutoff, they will be allowed
17 to register, as well. So, we are thinking about for that,
18 an order that would open that up for sometime in late
19 October and early November and probably run through the
20 beginning of the year, of the new year.

21 THE HONORABLE JUDGE FRANK: Mr. Flowers?

22 MR. FLOWERS: We are in agreement with that, Your
23 Honor, information is key for all of us.

24 THE HONORABLE JUDGE FRANK: And unless Judge Noel
25 has something, I know we discussed that at some length in

1 Chambers, so I think we have a good grasp of not just its
2 status, but also an updated explanation on the registration
3 process, itself.

4 THE HONORABLE MAGISTRATE JUDGE NOEL: I have
5 nothing else.

6 THE HONORABLE JUDGE FRANK: All right. And then
7 the fourth and final agenda item, except for perhaps unless
8 there are other issues, because I am not trying to cut
9 anybody off.

10 As I mentioned in Chambers, we had had the Motion
11 to Authorize Payment of Common Benefit Expenses For Lien
12 Resolution on QSF Administration Services. Pretty much all
13 parties were copied on that and I have received no negative
14 feedback or objections, so we can move the -- move that
15 along.

16 I would intend on doing the Order, to the extent
17 it is relevant, if I don't do it today, it will be tomorrow.
18 It will become Pretrial Order No. 31 in the case. So,
19 unless either of you have a comment on that, Mr. Flowers?

20 MR. FLOWERS: No, Your Honor, the only thing I
21 would say is just to make it clear, this is a motion that
22 deals with Providio, the lien resolution players' --

23 THE HONORABLE JUDGE FRANK: Right.

24 MR. FLOWERS: -- charges, as well as using some of
25 the common benefit to pay some of those charges.

1 MS. CATULLO: And Your Honor, for the Defendants,
2 we have not had a role in that. So, from our perspective,
3 we are not going to object.

4 THE HONORABLE JUDGE FRANK: Did you have anything?

5 THE HONORABLE MAGISTRATE JUDGE NOEL: I had one
6 other question. I'm sorry, if I could go back to the
7 settlement update? When Ms. Catullo talks about Stryker
8 funding the settlements, is that synonymous with actually
9 paying the Plaintiffs? Or is there another step that has to
10 happen between a settlement being funded and money actually
11 transferring to Plaintiff and their counsel?

12 MR. FLOWERS: Your Honor, there is an extra step
13 in there and that is we -- there's obligations under the
14 Master Settlement Agreement in terms of liens, resolving
15 liens.

16 THE HONORABLE MAGISTRATE JUDGE NOEL: Which is
17 your responsibility, the Plaintiffs' lawyers?

18 MR. FLOWERS: Correct.

19 MS. CATULLO: The money is out. 95 percent of the
20 95 percent, Stryker has paid the money over to the
21 Plaintiffs' escrow agent.

22 THE HONORABLE MAGISTRATE JUDGE NOEL: Thank you.

23 THE HONORABLE JUDGE FRANK: And I think the lien
24 process is moving along?

25 MR. FLOWERS: It is moving along. If we could

1 eradicate it in the United States, Your Honor, it would be
2 helpful to all these things, but obviously we cannot. Hence
3 we hire companies to usually handle it. They handle most of
4 it. And it is just a slow process at times.

5 THE HONORABLE JUDGE FRANK: Well, as some of the
6 lawyers in the room know and some on the phone that were in
7 my *Guidant* case, we had more than an issue or two on that.
8 And actually, frankly speaking, persuading the Defense to
9 let the Federal Court handle the probate and some of that
10 lien issue and starting from scratch in the State Court and
11 costing lots of money, lots of delay, which we eventually I
12 think got it resolved, but it was an issue for a time, so to
13 speak.

14 Are there other issues we want to address at this
15 time other than setting the next status conference? We will
16 let people kind of confer, there.

17 (Discussion off the record.)

18 THE HONORABLE JUDGE FRANK: I will ask first if
19 there are any other issues.

20 MR. FLOWERS: I don't think so, Your Honor. I
21 think we are good from the Plaintiffs' perspective.

22 MS. CATULLO: All good, Defendants.

23 THE HONORABLE JUDGE FRANK: What about tentatively
24 or otherwise setting a date and how soon you would like to
25 get back together? And if you want us to set it in northern

1 Minnesota when it is 20 or 30 below zero, we could probably
2 arrange that, but I have an idea that that probably won't be
3 a request, joint or otherwise.

4 MR. FLOWERS: Your Honor, could we -- is it
5 possible if we discuss this and then contacted you?

6 THE HONORABLE JUDGE FRANK: Certainly.

7 MR. FLOWERS: Because we are trying to figure out
8 what works best.

9 THE HONORABLE JUDGE FRANK: Certainly. Because on
10 the one hand I know there are a number of things you've each
11 said you are reaching out -- I will be doing the same. And
12 obviously, we don't want to have an unnecessary
13 get-together, or too soon.

14 And just so the people listening and other people
15 who weren't at counsel table in the courtroom, I would like
16 to think most people understand this. I mean, I believe
17 that the lawyers believe that if there are issues, they
18 don't have to wait for the next conference, they can pick up
19 the phone and we set up a short telephone conference. If
20 you don't get back, we wait until everybody is back in town.

21 And of course, anything we do on orders, we try to
22 get them out on the website. So, no -- yeah, we can just
23 sit tight. And when we kind of take a look at it and if we
24 haven't heard anything in the next few weeks, we might have
25 Ms. Schaffer just reach out to you to see if you have got

1 any dates in mind.

2 And I have already agreed, as I said back in
3 Chambers, if I learned of anything when I reach out again to
4 the -- I said four judges that doesn't -- I am usually more
5 in contact with Judge Martinotti, that is the fifth judge.
6 And as I said back in Chambers, some of you knew this, some
7 didn't, he had his confirmation hearing last week before the
8 Judiciary Committee at the U.S. Senate. So, we stay in
9 touch.

10 But, if I learn anything -- because I will be
11 reaching out to each of these Judges this week again to give
12 them an update, and again see what we can do to maximum
13 coordination for all of the remaining cases. I will let you
14 know what, if anything, if there's any changes or any
15 updates. And I would hope that you would each do the same,
16 as long as the other party knows I am being contacted.

17 So, anything else at this time, then, for
18 Plaintiffs?

19 MR. FLOWERS: No, Your Honor.

20 THE HONORABLE JUDGE FRANK: For the Defense?

21 MS. CATULLO: No, Your Honor, thank you.

22 MR. FLOWERS: Thank you.

23 THE HONORABLE MAGISTRATE JUDGE NOEL: Nothing
24 further from me. Thank you very much, Judge.

25 THE HONORABLE JUDGE FRANK: We are adjourned.

1 Thanks everybody for coming to town again. I'm sorry we
2 couldn't coordinate it with the State Fair. Apparently
3 there were some disgruntled parties because of that, so we
4 will try to do better next time.

5 THE HONORABLE MAGISTRATE JUDGE NOEL: Maybe the
6 Winter Carnival.

7 THE HONORABLE JUDGE FRANK: The Winter Carnival
8 probably won't do it for most of you, so no offense. So, we
9 are adjourned. Thank you.

10 (Adjournment.)

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17 I, Jeanne M. Anderson, certify that the foregoing
18 is a correct transcript from the record of proceedings in
19 the above-entitled matter.

20
21
22 Certified by: s/ Jeanne M. Anderson
23 Jeanne M. Anderson, RMR-RPR
24 Official Court Reporter
25